UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THRYV, INC.

- and -

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1269

Case No. 20-CA-250250
20-CA-251105

RESPONDENT'S POST-HEARING BRIEF

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December 28, 2020

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POST-HEARING BRIEF OF THE EMPLOYER

The trial in this case demonstrated not just that the Respondent did not violate the Act but that the General Counsel has pointed his finger at the wrong party. It was the Union that refused to adhere to the basic tenets of the Act, turning collective bargaining into a farce.

By the summer of 2019, Thryv, Inc.'s ("Respondent" or "Thryv" or "Company") Last, Best and Final Offer ("LBFO") had been in place almost a year. The International Brotherhood of Electrical Workers, Local 1269's ("Charging Party" or "IBEW" or "Union") complaints that Thryv had not bargained to a good faith impasse had been rejected by both Region 20 and the General Counsel of the National Labor Relations Board. Included in the LBFO was a force reduction provision that permitted the Company to administer layoffs, by job title, by seniority. On August 21, 2019, Thryv informed the IBEW that it was going to lay off all of its remaining "New Business Advisors[1]," provided thirty days' notice and invited the Union to engage in any desired discussions on the subject.

[1] The LBFO and collective bargaining agreement executed weeks after the layoffs cover three types of premise sales representatives: Business Advisors (formally known as Advertising Sales Representatives), Senior Business Advisors (formerly known as Key Account Executives) and New Business Advisors (formerly known as Account Executives New Media). New Business Advisors are also referred to as DSEs or Digital Sales Executives.

The notice could not have surprised the Union. In August 2018 in the course of their bargaining, the parties had focused on what was then called "DSEs" or Digital Sales Executives and their flagging value to the Company. The parties discussed the fact that folding them in with the regular sales force, the Business Advisors, would not work under the circumstances faced by the parties that August. Both agreed that there was too little revenue to be handled by the existing Business Advisors to permit further dilution by adding the DSEs to their ranks. Nonetheless the parties agreed to meet periodically to review the situation. (Tr. 819).[2]

Understanding matters continued to worsen for the DSEs, the Union never requested such a meeting. The "handle" of the regular Business Advisors continued to shrink, and by the Summer of 2019, the average number of accounts being handled by them was significantly below the national average, and this in a business that was losing overall revenue in double digits year after year.

In addition the six New Business Advisors who were laid off were not really engaged. They sold very few new accounts, which was their job, and they were not making the sales calls necessary to sell the Company's products to new customers. Not to be unkind, but it was apparent that the remaining six New Business Advisors had given in to the inevitable.

In the face of this stark reality, most unions would have attempted to bargain the softest landing possible. While the LBFO already provided severance pay, a union might have asked for more. Three of the six New Business Advisors would lose their disability payments upon layoff. Most unions would seek to address that issue. The LBFO contains no recall rights, but a responsible union might have asked for such rights, or preferential transfer rights, or waiver of COBRA copayments, or whatever a responsible union does in such cases.

[2] The Transcript is cited to herein as Tr. __, Joint Exhibits as Jt-__, and Respondent Exhibits as R-___.

But this Union did no such thing. While insisting on what both parties recognized to be "Effects Bargaining," this Union both ignored the "Effects" of the layoff and showed no interest in bargaining. It engaged in self-indulgent abuse of the Company while ignoring the interests of the employees it purports to represent. The LBFO provided thirty days for discussions to take place. The Union was not available until September 11, 2019 - nine days before the layoffs were to be implemented and twenty-one days after the Union was provided notice of the layoffs It came to the meeting on that day with no proposals, suggesting that the preceding twenty-one days were not spent in diligent deliberation. It spewed nonsense, demanding, as it did repeatedly, that the Company present its proposal before the Union could counter. It insisted that the layoff would be illegal because the Company had not met over the New Business Advisers' circumstances, despite not having requested such a meeting. It expended much time trying to engage in a debate whether the Company was eliminating all of the employees in the job title, or whether it was eliminating a channel. And most importantly it made clear that its principal agenda was to allow its chief spokesman an opportunity to harangue the Company with his own very special understanding of the law.

The General Counsel has chosen to bring this complaint. The centerpiece is an alleged failure to bargain over the layoffs. While any obligation to bargain the decision is unclear, what is not is that the Union never asked to bargain. Indeed, over one-hundred exhibits were admitted into the record and not one suggests that the Union ever requested to bargain over the Company's decision to lay off the six New Business Advisors. The parties over and over and over referred to their bargaining as "effects" bargaining. Stefan Guthrie, the Union's chief negotiator, conceded there was no request to bargain over the layoff decision. Certainly he made no proposals relating

to that decision -- unless one counts the injunction that to do so was forbidden under his view of the law. The Company never understood itself to be bargaining over the decision. [3]

Nor do the General Counsel's allegations over an alleged failure to provide information excuse the failure to request bargaining. First, for the reasons suggested above, the Union knew all it needed to know to bargain over the issue. There was a profound lack of need for these six employees, a fact known to the Union for almost a year. Second, the Union did not say that it wanted to make a proposal, but it lacked some key data. While it would have been false, at least the statement would suggest that the Union wanted to bargain over the decision but was stymied. No such after the fact rationale excuses its behavior.

The Company will respond to the General Counsel's allegations in the following material, but it first registers a protest. The General Counsel has turned the policy of the Act on its head in this case. The Company was willing to and attempted to bargain. As Guthrie's testimony proved, the Union does not understand the meaning of the word bargain. (Tr. 365, 366). While it is true, as Senator Wagner held, that employees may suffer when there is no good faith bargaining, the failure of the process here can be laid at the feet of their Union.

FACTS

1. The Rise and Fall of Yellow Pages.

There was a time, maybe twenty-five years ago, when every operating telephone company had its own "directories" outlet, and made a lot of money from them. (Tr. 799). The directories business had limited competition. They had access to new listings, and therefore ready-made leads for new businesses. And especially for the small to medium sized business owner, there was no

[3] While Guthrie did claim the Union made a request to bargain the decision (Tr. 513) after he conceded that no request for bargaining was made (Tr. 365, 366), the fact that Guthrie admitted the Union made no proposals (Tr. 355, 362) highlights Guthrie's lack of credibility.

comparable advertising medium. Television and radio were expensive, and there was no other practical way to reach the general public.

And success breeds success, if the public reaches for the directory, because that's where local businesses advertise, then local businesses must advertise there. (Tr. 19, 20). Competitors can be pitted against each other for size of ads. Businesses name themselves AAA to be the first entry in their category.

For the yellow pages sales person, a modest income was easy; a really good sales person could make a lot. The business was a subscription business. Renewals were easy. Big money could be made by selling ever more advertising. (Tr. 20).

But then came the internet. Search engine programs quickly made the yellow pages a quaint relic of a bygone era. (Tr. 22, 23). Especially when cell phones graduated to providing connectivity to the internet, Google was not only available on a computer, but it could be carried around in most peoples' pocket or purse. Robert Bickmire, the Company's Director of Sales Planning, testified:

> Well, when my -- I first entered the business, of course, it was -- it was -- it was just a -- a print industry, where we produced print yellow pages around the country and -- and it wasn't just the company that I worked for, but other yellow page publishers pretty much did the same thing. In the early 2000s, of course, with the advent of -- of digital as a medium and as a choice for consumers, the yellow page industry experienced a -- a decline that it's still experiencing. And when I say yellow page industry, I'm referring to the print yellow pages, and -- and advertising, customers, and revenue in print yellow pages -- start of the decline that we're experiencing today. (Tr. 890).

As the record reflects, the decline has been "very significant" and the industry rapidly crashed. (Tr. 890). Bickmire testified "From what we had in terms of revenue, you know, ten years ago to now, it's night and day. I mean, we -- we've continued to lose revenue in the high teens, at the -- at the very least." (Tr. 890). As seen through the progenitor of the charged party here, Verizon Information Services ("VIS"), both manpower and revenue were a small fraction of

what they had been in or around 2000. Indeed, in the early 2000s revenue was around four billion dollars. (Tr. 799). Today, the repeatedly merged Company has an annual revenue around one billion dollars. (Tr. 799). VIS, itself a combination of the directories business of Bell Atlantic and GTE was spun off in 2006, and was bankrupt by 2009. (Tr. 795, 799). After emerging from bankruptcy, it merged with Dex One in 2013, itself a formerly bankrupt consolidation of directories companies. (Tr. 801). And bringing the history to the present case, in June of 2017, the last two large directories companies, what was then Dex Media, and what had been YP, also a combination of several other directory companies, were combined. (Tr. 802).

2. The Combination of Dex Media and YP.

YP was formed in 2012 when AT&T sold off its directory subsidiaries. (Tr. 801). Dex was formed by the 2013 merger of Dex One and SuperMedia, which both included the previously spun-off directory businesses of various phone companies. (Tr. 801). On June 30, 2017 the Company, under its former name Dex Media, Inc., acquired YP. (Tr. 802).

It was not a combination of equals. Dex's management had concluded directory advertising was not a business with a future and that efforts to compete in the digital advertising space would not work. (Tr. 819). Around 2016 Dex, exploiting its ready access to a customer base of small and medium sized business, developed a suite of apps to handle the various administrative demands that dog those businesses. (Tr. 695). The product became what is now Thryv. (Tr. 695).

In contrast, while Dex was transitioning, YP was rapidly failing. YP had the same amount of revenue as Dex but twice the number of employees. (Tr. 802). By 2017 it had been on the block for a year with only one serious bidder, Dex. (Tr. 802). The deal closed in June 2017; the business remained headquartered in Dallas; management was still the Dex team. In short, there likely would be no YP but for Dex's acquisition. (Tr. 802).

Upon acquiring YP, Dex's labor group, led by Elizabeth Dickson, reached out to the several unions that represented YP bargaining units. She immediately informed them that Dex would recognize the unions and adopt the existing CBAs. (Tr. 803, 808). Over time she would explain to the unions that Dex had a bargaining goal of making the YP CBAs like the existing Dex CBAs. (Tr. 808). Dickson testified that those agreements were "flexible" and gave the Company "good latitude to run the business." (Tr. 809). Guthrie's testimony that the only difference between the Dex and the YP contracts was severance pay (Tr. 293), says a lot about his refusal to acknowledge reality, after months of bargaining. There were "huge differences" between the contracts including the fundamentals: compensation plans, sales policies, market assignments, and assignment of accounts. (Tr. 809). Labor relations had been productive in Dex areas, and Dickson did not see how she could explain to existing bargaining units why the newly acquired YP units should get better contracts than they had. At the same time, she would not insist that the YP units take less.

At the outset, Dex's CEO wrote to YP employees, welcoming them, but emphasizing an issue. (R-23). Dex's sales force handled far more revenue per sales person than did YP's. An underutilized sales force is bad for everyone. It's an additional expense for the employer and it also compromises the ability of talented sales persons to earn commissions. The remedy is either to increase revenue by selling new business or to decrease the size of the sales force. It was made clear that reducing the workforce might be necessary to the success of the combined enterprise. (R-23).

3. The Relationship Between The Union And The Company.

Prior to Dex acquiring YP, according to Ralph Vitales, the relationship between YP and the Union:

> "[W[as trying at best. Very challenging. The union believed the company was trying to impose its will on the union and its membership. My -- the chair at that

> time was Keith Halpern. He was the VP of labor. The union really thought he was an evil man." (Tr. 707).

The Union and Dex already knew each other in the Summer of 2017. The Union and Dex, and in particular the Union and Dickson, dealt with each other for the prior four years for the "Rocky Mountain" bargaining unit. (Tr. 708). At the outset, the Union asserted that it was pleased that Dex was replacing YP as the employer, and their earliest meeting was spent contrasting the bad behavior of YP with the productive relationship the Union enjoyed with Dex. (Tr. 283, 708).

That sentiment lasted until the parties sat down to bargain. As Vitales, testified "It- it became very trying and challenging again." (Tr. 708). When Dex told the Union that it wanted a CBA like the existing Dex CBAs, and that it did not see why the Union should get preferred status, Dickson became as evil as Keith Halpern. The back and forth of the relationship can certainly produce differing perspectives. What cannot is the contrast between Dex's relationship with the Union and its relationship with the Southern California IBEW Local or with CWA Districts. By 2019, the Union absorbed at least 80% of Dex's labor relations team's time and legal spend. (Tr. 804).

The Company has produced the email exchanges between Dickson and Guthrie. (R. 6). Of course the Judge cannot be expected to referee disputes not directly before him. But the subject matter, the tone and the sheer volume of the Union's constant demands to bargain over non-issues and to review volumes of information unnecessary to even those bargaining demands should be obvious from the over five-hundred emails resulting in close to two-thousands pages of documents. (*Id.*) Vitales described some of the most bothersome examples. (Tr. 711-718).

A straightforward example will help to explain. In January 2019, the Company offered its employees a group of curated leads for new customers. (R-4). New sales are critical to the Company, and also earn employees premium commissions. To encourage employees to sell these

prospects, the Company also wanted to extend the "hands off" period during which other employees could not approach the assigned leads. Because this would vary the rule contained in the Company's sales policy ("SP/MAG") (Jt. 3), it gave notice of the intended change to all of the bargaining representatives. (Tr. 717, R-4). With one exception, the other twenty or so bargaining representatives either said nothing or thanked the Company. (Tr. 713). The Union not only demanded to bargain, but made a demand for information virtually none of which related to the proposed change. (Tr. 428 - 242, R-4).

Likely, part of the issue is the disparity in the parties' resources. The Company struggles with double digit losses year after year. In fact, in 2019 Company revenue was down an additional 18% to 22% from 2018. (Tr. 819). While it no doubt has a greater budget than does the Union, that hardly reflects economic health. For its part the Union had over $2.5 million in assets and a high priced leasehold conveniently located across the street from Region 20 as of June 30, 2019. (R-5).

What is striking about the parties' relationship is how easy it should have been. At the outset it had to have been obvious to the Union that but for Dex, there would be no jobs. At the hearing, the Union conceded that it knew the traditional directories business was on its way to extinction. (Tr. 271 281-282, 377, 622, 819). Any sensible union would have understood that the Company was not going to maintain for it CBAs richer than those enjoyed by its incumbent unions. And any sensible union would understand that the workforce has to shrink, and its role should be to demand humane treatment for its members whose employment would end. By all means, unions should demand to bargain over things that matter, but this Union cannot even tell when it is obstructing Company action that is valuable to its members.

4. The Layoff Decision.

Having employees specialize in selling new business seems like a good idea. (Tr. 930). Thryv desperately needed new business, and hiring people to focus on that need seems intelligent. It also seems not to work. (Tr. 739-740, 818). Selling "new business" is difficult, and over the years seems to fail if not supported by the sale of existing business. (Tr. 333). By 2019, Thryv was discontinuing its use of new business sales people. (Tr. 784-785). The entire "digital region" sales force had been laid off the year before. (Tr. 789). And throughout the Country, the employees who concentrated only on new sales were being terminated, except for a few cases where exceptionally able employees could be matched with a vacancy in the regular sales ranks.

In Northern California, two former New Business Advisors, Louis Pantoja and Marlon McConer, had been placed in vacancies that existed at that time. Pantoja was placed in San Francisco where there had been three recent departures. (Tr. 778). McConer had been placed in Northern California back in January before any layoff decision had been made. (Jt. 22). The Union has not presented any evidence that these two former managers did not go into current existing vacancies or that they were not superior sales people. None of New Business Advisors (also referred to as "NBA" or "NBAs") applied for any openings that existed. (Tr. 785).

Nor with due respect had the six NBAs given the Company any reason to want to retain them in regular Business Adviser roles. Passing the extraordinary incidence of disability in the group, by 2019, it appeared that all of them were putting in minimal effort. And the existing regular Business Advisors had no work to share. Ideally there should be one-hundred-seventy-five to two-hundred accounts assigned to each sales representative. (Tr. 939). Bickmire testified why the Company believes that figure is the ideal metric:

> Well, we don't want to have really more than that -- too many more than that, I should say, because you -- you want to allow time for the regular Premise rep to also search for and sell new business themselves during a -- during a week, during

> a month, during the year. So you don't want to have all of their time taken up with existing customers because they need some time available to search for new customers. Now, you don't want them to have, you know, 50 accounts either because they're not going to make any -- any money that way, right? I mean, you know, their -- their commissions would be affected because there's just not enough existing customers to -- to keep them. (Tr. 939-940).

The average number of accounts that premise sales representatives have handled over the last twelve months nationwide was one-hundred-seventy-three. (Tr. 941). The average number of accounts that the NBAs have handled in Northern California over the last twelve months was "about 128." (Tr. 941).

The issue was not a new one. In or around August 2018, the Company and Union had discussions regarding the possibility of folding the NBAs into the Business Advisor channel. (Tr. 335-336, 789). Dickson told the Union, specifically Guthrie and Mike Waltz, Former Union Business Agent, that the Company did not have the ability to absorb the NBAs into the Business Advisor channel because the economic metrics did not support it. (Tr. 790). Both Waltz and Guthrie agreed that from a revenue perspective, absorption was not plausible after the Union underwent its own analysis. (Tr. 336, 790).

At hearing Guthrie testified that the Company put the Union on notice in 2018 that the NBAs were struggling from a revenue perspective and that such performance could not continue. (Tr. 335-336, 339). Guthrie also testified: that the size of the bargaining unit has decreased over the years, that the amount of revenue premise sales representatives are assigned to handle over the years has decreased, that the NBA role has had declining revenue, that the Company's revenue has decreased year over year and that the Company has previously terminated employees in the digital region. (Tr. 270, 277, 336, 339, 342, 347, 349, 350, 352). Further, at hearing Waltz testified: that he knew that the market revenue has been decreasing for the NBAs for the last few years, that the amount of revenue NBAs handle was decreasing year over year and that the Company had told

the Union that there was not enough revenue to fold the NBAs into the Business Advisor Channel. (Tr. 622, 623, 624).

From August 2018 to August 2019, nothing changed regarding the Company's ability to absorb the NBAs into the Business Advisor channel. (Tr. 790). The Union never sought a discussion under the CBA Transition Agreement process. (R-11). The Company had explained in various contexts in the first half of 2019 that the revenue had continued to decline and the Union apparently understood that such a discussion would be fruitless. (Tr. 339).

Respondent Exhibit 7 -- which Vitales walked through at the parties meetings (Tr. 765-766) - captures the performance of the six NBAs for 2018-2019. (R-7). As he testified:

> "The tab 2019 detail and tab 2018 detail is the backdrop to the cumulative sheet that were looking at on the summary. So it breaks down the actual accounts and what transpired from a revenue standpoint….it was apparent from the results that they were not selling new as well as the revenue that they were losing year over year. It was just a position that the company couldn't sustain." (Tr. 729-730).

The primary responsibility of the NBAs was to sell new customers and that was not happening. Respondent Exhibit 7 shows the number of new customers each of the six NBAs obtained during 2018-2019. Vitales testified that:

> "They were selling new customers but as you look at column L, that's the volume of sales they were selling. So 2 [Donna Kinzler] , 1 [Rebecca Weiss] , 0 [Roger Sherman], 13 Mr. Thomas, 6 [Elizabeth Bell] and 3 [Guia Rognereud]. So it was pretty lackluster from a performance standpoint." (Tr. 731). And when pressed, the polite Vitales conceded that "lackluster" (Tr. 731), was "terrible." (Tr. 731-732).

Nor were the NBAs able to retain the customers they had previously sold. As new business specialists, the only revenue they were assigned from existing customers was customers they had originated. At the start of the 2018, Jeremy Thomas has $20,039 in monthly revenue. (R-7, Tr. 732). At the end of the year, Mr. Thomas had $10, 642 in monthly revenue - a decrease of 46.9%. (R-7, Tr. 732). Further, at the start of 2018, Roger Sherman had $4,158 in monthly revenue. (R-7). At the end of the year, Mr. Sherman had -$1,993 in monthly revenue - a decrease of 147.9%.

(R-7). Although these numbers appear improbable, they accentuate the ineffectiveness of the NBAs.

And, as noted above, the NBAs appeared to stop trying. Respondent Exhibit 9 shows the activity of the six NBAs for 2018-2019 through Salesforce. (R-9). All premise sales representatives put their calendar, their opportunities, their sales, likelihood of potential of sales, and cold calling numbers into Salesforce. (Tr. 739). Employees are required to enter their activity into the Salesforce log. (Tr. 740). Upon review Vitales:

> "[D]iscovered that there was minimal information inputted into Salesforce. That would be appointments as well as the -- their call logs. There was -- there was very minimal calls going out. And as we all know, if they're looking for new business, it becomes a numbers game. You have to make hundreds of calls to make a few sales." (Tr. 739-740).

Vitales explained that based on his review of the Salesforce log and experience as the sales manager "from the activity it doesn't appear that they're [the NBAs] full engaged." (Tr. 742). At hearing, Vitales also testified that the NBAs:

> "[W]ere totally underperforming and that revenues were shrinking all around the company and we had no room to actually put them into the -- the normal traditional title, but there -- there was not enough revenue. They weren't selling enough new to maintain their positions." (Tr. 727-728). Vitales further testified that with the "diminishing revenue, we -- we could not absorb six individuals into the -- the -- the traditional business advisor title because there was not enough revenue to go around." (Tr. 737).

Finally, at hearing, Dickson testified that the Company considered the effectiveness of NBAs around the country and "that particular group of employees who were supposed to bring in new business were not meeting the business' needs. They simply weren't -- they weren't cutting it." (Tr. 818).

In response to overwhelming evidence that the NBAs no longer had a place in the Company, and that the Union well knew it, Counsel for the General Counsel put on no contrary evidence that would suggest that the work of the six NBAs had accomplished its intended purpose

or that it merited consideration for an opening even had one existed.[4] Ultimately, none of the NBAs applied for a job opening anywhere. (Tr. 785).

5. The Notice to Lay Off the New Business Advisors and The Start of Bargaining.

By the summer of 2019 the Company was planning a layoff, as it was elsewhere in the country. On August 21, 2019, while the parties remained at impasse bargaining a successor collective bargaining agreement, the Company initiated the implemented process for force adjustments in accordance with the LBFO. (Jt. 29). It gave the Union notice in accordance with the LBFO. It prepared severance papers in accordance with the LBFO. Of course it offered to sit with the Union and bargain with the Union, it presumed over effects. Waltz admitted that prior to that meeting the Union sat down and discussed the layoff with the impacted employees. (Tr. 621).

Dickson emailed Karen Gowdy, Union Business Manager, the notice of layoff. The notice explained that the Company would be eliminating the position held by each of the six NBAs, and a force adjustment would be applied pursuant to Article 30 of the implemented LBFO with a "resolution date" of September 20, 2019. (Jt. 29). Dickson's notice thus started the thirty day clock.

It would be expected that the Union would drop everything, make requests for whatever information was necessary, and prepare its proposals. Instead, the Union played hard to get, ultimately insisting that it could only start bargaining on September 11. Nothing in the Record provides any explanation for why this delay was necessary.

On August 22, 2019, the day after receiving the Company's notice, the Union requested the Company's availability to sit down and bargain over the "notice." (Jt. 31). By email the next day, Vitales proposed to meet on September 4 and 5, 2019. (Jt. 32). Rather than try to expedite

[4] The General Counsel objected to the admission of performance data for the six NBAs (R-7 and R-9), suggesting that he is not claiming that six NBAs who were to be laid off merited the same treatment as McConer or Pantoja.

matters, Guthrie then called Vitales and said that the Union was not available until September 6, 2019. (Jt. 32, 33, Tr. 719). When Vitales agreed to meet and discuss the layoffs on that day, Guthrie reneged, and stated that the Union was not available. The parties ultimately agreed to meet on September 11 and 12, 2019. (Tr. 719). By email on September 5, 2019, the Company reminded the Union that the "resolution date for the force adjustment would be September 20, 2019" and confirmed the scheduled meetings. (Jt. 34).

The Company was unwilling to keep the six NBAs in the dark that long and scheduled meetings with them. The Union was included in the Company's communications when the force adjustment was announced to the NBAs. (Jt. 35, Tr. 721). The Company scheduled an initial conference call for September 6, 2019, and the Union was invited to join. (Jt. 35). Invitations were sent to four Union representatives, and at least Guthrie and Waltz joined the call. (Tr. 720). Terry Henshaw, Regional Vice President, conducted the meeting by reading from a prepared script. (Tr. 719).

There was no real controversy about what Henshaw read on September 6. (Tr. 719). He expressed regret that the employees' positions were being eliminated, aimed no fault at the employees, and told them that Monique Love, an HR manager, would explain their benefits. The Union asked for copies of the packages, which it received. (Jt. 35, Tr. 721) It also demanded the "script" for Mr. Henshaw's speech. (Tr. 721). Commencing its fixation on whether the Company was doing a layoff or a channel elimination, it apparently wanted to see what Mr. Henshaw planned to say, rather than what he actually said.

After the call, Vitales emailed Dickson a summary of the call and a copy of the script Henshaw read from. (Jt. 36). That script made clear that "Thryv will administer a force adjustment in the Sales Organization in the NBAs title affecting 6 DSEs. These positions will be eliminated

effective September 20, 2019." (*Id).* Thus, the Union was able to contact the employees before they received the severance waivers, had two weeks to review them before unit employees were laid off, and had two months to review them before unit employees were required to sign them.

When the Union finally saw fit to sit with the Company, it became apparent that bargaining was not its goal. The reason for the hijinks was not inexperience. It had within the prior year bargained with the Company over the layoff of hundreds of "digital region" employees and then over the layoff of all of the employees in the Denver call center, represented by the Union under the "Rocky Mountain" CBA. (R-11). It had negotiated with prior management effects of the Pleasanton layoff. (Tr. 734-735). The effects agreement the parties reached in Denver is typical. It addresses issues of importance of employees facing layoff. (R-9). At no point in time did the Union present a similar proposal or any proposal at all in support of the six NBAs. Instead Guthrie fiddled away the parties meetings in Nero-like fashion.

6. The Meetings Over The Layoffs.

The parties devoted five bargaining sessions to the layoffs - September 11, September 12, October 3, October 18 and October 31, 2019.

The Union did not make a proposal prior to the parties meeting on September 11 or come to the September 11 meeting with a proposal. (Tr. 722). Vitales testified that the purpose of the September 11 meeting was to bargain over effects and that he had no understanding that the Union wanted to, or requested to, bargain over the decision to layoff the six NBAs. (Tr. 721-722). The Union's own bargaining notes from the meeting have the title "DSE Effects Bargaining." (Jt. 38, Tr. 721). At no point in time on September 11 did the Union request the Company bargain over the decision to lay off the six NBAs.

Rather, the Union claimed, both at the bargaining session and in email correspondence that same day, that what the Company was doing was illegal and that the Company "failed to notify

the Union." (Tr. 722, Jt. 39, pg. 3). By email on September 11, Guthrie claimed there was a substantive difference between what the Union was told in the notice sent on August 21 (that the force adjustment would impact the "six incumbent NBAs Premise" whose "positions will be eliminated" due to the "ineffectiveness of a digital only sales force") and what Henshaw had explained to those individuals during the September 6 call (that there would be a force adjustment impacting them because the Company was "eliminating" the "Northern California DSE Channel"). (Jt. 41).

As Dickson explained when responding to Guthrie later that same day, there was nothing inconsistent between the two messages. *Id*. The only individuals in the unit in the NBA title were the individuals listed in the August 21 notice, and each of them had been transitioned to that title from the DSE position as part of LBFO implementation as explained to the Union in a letter emailed on October 31, 2018. Vitales confirmed this when he explained at the September 11 meeting that the Company was "eliminating all of the new business advisors, that we weren't going to backfill the channel. So inevitably, anyone under the new business advisor title would be laid off." (Tr. 722 - 723). Vitales made clear that Henshaw did not state that the Company was eliminating a channel but that the Company is having a reduction of people in a channel. (Jt. 39, pg. 3). Vitales also made clear that the affected locations are "all locations (of the 6) that have that job title." (Jt. 39, pg. 7).

Rather than present proposals, Guthrie demanded the Company first provide the Union a written proposal concerning the layoffs, based on a hitherto unknown theory of bargaining. From his perspective, the notice of layoff did not invite proposals, but the Company was somehow required to propose the layoffs as a trigger to Union action. (Tr. 724).

The parties met again on September 12. The Union did not make a proposal prior to the parties meeting on September 12 or come to the September 12 meeting with a proposal. At no point in time on September 12 did the Union request the Company bargain over the decision to lay off the six NBAs. The bargaining notes from the Company and Union again do not contain even a suggestion that the Union was requesting to bargain over the decision. (Jt. 43, 44). The Company's bargaining notes state that Vitales informed the Union the NBAs "title is being eliminated. All employees in N.CA (DSE) are being [sic] surplused…Titles intact as in the contract. Company will not back fill those jobs. Reducing the entire population." *Id.* At one point Vitales made clear that the Company was "following Article 30 - you have it in the LBFO." Guthrie responded "I don't have a proposal for effects bargaining." To which Vitales responded "You have it in the LBFO." Guthrie, threatened, "Ralph - ok you want to do it the hard way? What else you got? "(Jt. 44, pg. 1, Tr. 723). Later in the bargaining session Vitales repeated "I said the company is using Article 30 as the company's proposal with regard to the Force Adjustment/reduction - which the union was notified - notification to Karen." Vitales, accused of not bargaining, told Guthrie that the Union can "accept or counter." (Jt. 44, pg. 4).

In an email sent on September 16, 2019, Guthrie claimed that he was "following up" on the September 12 meeting, quoted language from Article 15 of the LBFO, stated that the Company could not exercise its discretion retained under that language, and then requested various information relating to the "objectives" for the employees affected by the force adjustment. (Jt. 53). None of this has anything to do with the force adjustment. Article 15 of the LBFO addresses "Sales Compensation," not anything related to force adjustments. (Jt. 2). Moreover, as Vitales explained when fully responding to one of the Union's requests for information on September 23

2018 (the Company also responded in part on September 16), the objectives had not changed. (Jt. 54).

After September 20, 2019, the Company provided information confirming that it had offered severance in accordance with Article 30.4 of the LBFO. The Union requested a copy of the form that had been used under the Rocky Mountain Agreement, which the Company provided by email on October 1, 2019. (Jt. 57). The Union requested copies of "all signed waivers" later that day, and the Company provided copies of the signed releases the day after that. (Jt. 58, 61). The Union again requested copies of the "signed waivers" on October 30, 2019, along with the "payouts" and "expenses." (Jt. 61). That same day, the Company emailed the copies of the four signed releases along with the paystubs showing the severance payouts, explained that two individuals had not signed waivers, and asked the Union to identify what expenses it claimed were not paid. (Jt. 58). After clarifying what exactly the Union was seeking, Vitales continued to email the Union requested information regarding the payments. (Tr. 725, Jt. 57, 95, 98, 99, 100).

The parties met again on October 3. The Union did not make a proposal prior to the parties meeting on October 3 or come to the October 3 meeting with a proposal. The Union's bargaining notes from the meeting have the title of "Effects Bargaining DSE." (Jt. 59). Nowhere in the Union's own bargaining notes is there a suggestion that the Union was requesting to bargain over the decision to lay off the six NBAs. (*Id.*) The Company's bargaining notes also have the title "N.CA Effects Bargaining (DSE RFIs)." (Jt. 60). The first line on the Company's bargaining notes noted that Guthrie has two questions related to "effects bargaining." (Jt. 60, pg. 1). Vitales again made clear that the Company was relying on Article 30 of the LBFO. (*Id.*). The Union complained, both at the bargaining session and in email correspondence that same day, that the notice provided by the Company did not expressly state the "work locations" of the six employees. (Jt. 62). The

August 21 notice explained that the plan was to eliminate the position of every unit employee in the NBA title and thus that all work locations with that title were affected. (Tr. 723). Guthrie also discussed his version of the bargaining history prior to implementation and his belief that the LBFO did not address the DSEs by transitioning them to the NBAs-Premise title. (Jt. 59, 60).

As late as October 16, Guthrie, in an email entitled "Effects Bargain Northern California Bargaining," still argued that the Union has "not received any written proposals from the company regarding force adjustments to date." (Jt. 77).

As if to confirm that the Union really had no interest in bargaining, Guthrie then asserted that the Company has "proposed verbally that the union consider Article 30 as your full and complete proposal please confirm for the record." (*Id*). What required negotiations was the layoff under Article 30 announced by the August 21 notice. Every time the Union conditioned its making a proposal on the Company first making a proposal, it was the Union that was not bargaining in good faith.

The parties met again on October 18, 2019. The Union did not make a proposal prior to the parties meeting on October 18 or come to the October 18 meeting with a proposal. The Union's bargaining notes from the meeting have the title of "Effects Bargaining." (Jt. 82). Nowhere in the Union's bargaining notes is there a suggestion that the Union is requesting to bargain over the decision to lay off the six NBAs. (*Id.*). The Union's notes clearly show that Vitales told the Union that the Company is following Article 30 with regard to the force reduction for purposes of effects bargaining. (*Id*). The Company's bargaining notes are entitled "IBEW 1269 N.CA - Effects Bargaining" (Jt. 81). Like the Union's bargaining notes, the Company's notes reflect that Vitales again made clear that the Company has "declared a force reduction and we're bargaining the effects of that. The termination of the DSE (layoff)." (*Id* at pg. 1).

The parties met again on October 30, 2019. The Union did not make a proposal prior to the parties meeting on October 30 or come to the October 30 meeting with a proposal. The Union's bargaining notes from the meeting have the Title of "DSE effects." (Jt. 93). Nowhere in the Union's own bargaining notes is there even a suggestion that the Union is requesting to bargain over the decision to lay off the six NBAs. (*Id.*) The Company's bargaining notes are entitled "IBEW 1269 N. CA. - Effects Bargaining." (Jt. 92)

While the adjectival quality of each side's notes differ, one thing does not: while both parties' labelled their notes "effects bargaining," very little in the content of the meetings reflects effects bargaining.[5] Some of the reasons are obvious. The Union presented no proposals to mitigate the effects of the layoff.[6] The Company had scheduled and, after thirty days effected, a layoff in accordance with what it believed were the controlling rules, set out in Article 30 of the LBFO. The Union demanded that the Company make a proposal, and rejected the idea that the ball was squarely in its court.

The materials relevant to the effects of the layoff were produced by the Company on demand. It provided the severance format, and then the specific packages sent to employees calculated pursuant to the LBFO. (Tr. 725). It provided data on the employees on disability. (Tr. 725, Jt. 55). It provided the releases that under the LBFO it had a right to seek in exchange for the severance. (Jt. 2, pg. 48, Article 30.4). None of these materials induced any kind of a proposal from the Union.

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[5] Even with the summary of the meetings above, there is probably no way to further describe the meetings other than to suggest that the Judge review the parties' notes of those meetings. Conclusory terms such as bombastic, insulting, and the like would be just that. Respondent also suggests the Judge review Vitales testimony concerning Guthrie's disrespectful behavior at the bargaining table. (Tr. 711).

[6] The possible exception is that at one point, Guthrie asked whether the NBAs could apply for jobs elsewhere in the Company. Vitales said they could and noted where the open jobs were listed. The Union made no proposal seeking preference in the application process. There is also no reason to believe that any of the NBAs would be inclined to forego severance and move elsewhere Ultimately, they did not apply. (Tr. 785).

That is not to say that the Union did not control the meetings. As seen above, and laid out in the parties bargaining notes, the entire subject matter was Union questions, Company responses, and Union rejection of the responses. Besides nonsensical demands for a Company proposal (Jt. 44, pg. 1, Tr. 723) through October 2019, there were repeated allegations of illegality, because, for example, the Company had not participated in meetings which the Union did not request (Tr. 722, Jt. 39, pg. 3), that the Company did not put the locations of the NBAs in the August notice (Tr. 723) despite that the Union had already been given every employee's address, and the Union had already spoken to the NBAs (Tr. 624-625)[7] and an obsessional demand to know who would be reassigned the NBAs accounts. The reassignment were obviously not relevant to the layoff, and any event, there would be fewer because the NBAs sold new accounts. Vitales prediction -- that the accounts would not be reassigned until after the layoffs and when the relevant markets broke -- was that the accounts would be reassigned, when appropriate, in accordance with the Company's SP/MAG. (Tr. 406-407).[8] The Union's preempting the purpose of the meetings was not to serve the end of gaining agreement on effects, but to produce exactly the opposite result.

In view of all of this, the Counsel for the General Counsel concedes that the Company satisfied its obligation to bargain over effects, the subject matter that both parties said was the reason for their meetings. Instead he asserts that the Company laid off the NBAs without "affording the Charging Party an opportunity to bargain with respect to this conduct and/or without first bargaining with the Charging Party to a good faith impasse." The opening of Counsel for the General Counsel did not articulate any theory of violation that went beyond the allegations of the

[7] Since the Company would rarely lay off everybody in a job title, the provision was to identify at which locations the surplus existed to facilitate required bumping from one location to another. The reason why Mr. Vitales responded to the Union that the Company was laying off all of the NBAs was simply because that was the relevant information.
[8] Perhaps Guthrie was seeking data in support of his theory that the layoff would violate Article 41 of the LBFO. (Tr. 411-412). All else about the theory aside, the request still had nothing to do with effects bargaining.

Complaint. The Judge asked the parties to address the "Article 30 versus Article 41" issue such as it is. (Tr. 412). While the Respondent follows that instruction, there is no allegation in the Complaint that the Company violated Section 8(a)(5), by failing to follow the LBFO, let alone that any such failure deprived the Union of the right to bargain over the layoffs. And while the General Counsel certainly makes allegations around RFIs, the Complaint does not suggest that any information was necessary to formulate proposals regarding the layoffs, nor was any evidence presented to support such a claim. The matter is addressed below, but for the most part the Company deals with the RFIs for what they appear to be, claimed violations of the Act, causally unrelated to the layoffs.

ARGUMENT

I. The Decisional Bargaining Charge.

There are valid reasons why the Respondent might have decided that it had no obligation to bargain over its decision to lay off the NBAs, and would not. *See* pages 23 - 32 below. The Union here never put the Company to that choice.[9] If the Union wanted to bargain over whether to lay off the NBAs, it had an obligation to say so and present economic rationales to dissuade the Company from doing so. The Union never hinted at such an agenda. It acted, quite reasonably, like there was little point in broaching the issue, because based on all of the circumstances, the decision to lay off was inevitable, and no concession it might be willing to make would have persuaded the Company otherwise.

A. The Obligation To Bargain Attaches Only When A Request Is Made.

The Act requires collective bargaining when a union asks an employer (or vice versa) to bargain over a mandatory subject. *See* Section 8(a)(5) and 8(b)(3); *see also Oberthur Techs of Am.*

[9] Allegations that Thryv had not bargained to a good faith impasse have already been rejected by Region 20 and the General Counsel. (R-1, R-2).

Corp., 368 NLRB No. 5, *8 (2019) ("[T]he Act places on unionized employers a duty to bargain in good faith regarding any and all mandatory subjects of bargaining when requested by the union to do so."); *see also NLRB* v. *Borg-Warner Corp.*, 356 U.S. 342, 349 (1958) (regarding mandatory subjects, the employer and union upon request have an "obligation . . . to bargain with each other in good faith," although "neither party is legally obligated to yield"); *see also NLRB v. Katz*, 369 U.S. 736, 743 (1962) ("A refusal to negotiate in fact as to any subject which is within § 8(d), and about which the union seeks to negotiate, violates § 8(a)(5) though the employer has every desire to reach agreement with the union upon an over-all collective agreement and earnestly and in all good faith bargains to that end."); *see* also *Bell Atlantic Corp*., 336 NLRB 1076, 1086 (2001). It could not be otherwise.

Here the accent is on "ask." The process is bilateral, and one party needs to alert the other to an invitation to engage in the process. *See NLRB* v. *Columbian Enameling & Stamping Co., Inc*., 306 U.S. 292 (1939) (it is well settled that that a demand upon an employer, by the accredited representative of his employees, that he bargain collectively is normally a prerequisite to a finding of a refusal to bargain); *see also Burton-Dixie Corporation*, 103 NLRB 880 (1953); *see also Avon Convalescent Center*, 209 NLRB 937 (1974) *see also RBE Electronics of S.D.* Inc., 320 NLRB 80, (1995); *see also Vigor Industrial, LLC, 363 NLRB No.* 70 (2015).

In this case, the Union not only failed to request decisional bargaining, it implied the contrary, by insisting on "effects bargaining." Both parties' notes reflected the nature of their meetings. Their emails back and forth carried "re" lines of effects bargaining. (Jt. 53, 54, 55, 56, 58, 61, 76, 88, 89, 94, 97, 98). Simply put, the Respondent was never asked to do what the Complaint claims it failed to do. The Union had notice of the layoffs, had the opportunity to seek decisional bargaining and never did. *See United States Lingier Corp*, 170 NLRB 750, 752 (1968),

("We find that the Union did have notice of Respondent's plans and that, in failing to request bargaining over the removal, it waived its rights in that matter. On the basis of the foregoing, we find that Respondent's conduct was not in violation of the Act, and we shall dismiss the complaint."); *see also* In *City of Hospital E. Liverpool,* 234 NLRB 58, 59 (1978); *see also Medicenter, Mid-S Hospital*, 221 NLRB 670, 678-679 (1975) ("The answer to this question, as to many other questions arising under the Act, requires an examination of all the attendant circumstances. The Board has held that on receipt of adequate notice, the burden shifts to the union to pursue the matter, if it wishes to do so…Such a failure of prosecution constitutes a waiver of a union's right to bargain.").

Here the Charging Party was put on notice of the Company's intention to initiate a force reduction of the six New Business Advisors on August 21, 2019. (Jt. 29). The record contains no contrary evidence, and Guthrie admitted that the Union received notice of the Company's intention to move forward with the layoffs in September. (Tr. 73, 79). Guthrie also admitted that the Union knew it had thirty days to discuss the matter with the Company prior to the resolution date as provided both in the August 21, 2019 notice and the LBFO. (Tr. 321, Jt. 2, 29.)

This Union does not hesitate to request to bargain. (Tr. 711, 712, 713, 807). Its response to the "notice" of layoffs was a request to bargain over the "notice." (Jt. 31). Assuming that the response might have been interpreted to cover decision bargaining, it became apparent that the Union meant effects. (Tr. 721, 722, 769, 818). Guthrie, albeit reluctantly, conceded that there had been no request to bargain over the decision. (Tr. 365-366). And, Guthrie's bargaining partner, Vitales, testified, not at all equivocally, that he understood the bargaining was over effects. (Tr. 721, 722). He testified that he does not recall the Union ever requesting to bargain over the decision to lay off the New Business Advisors and that he had no understanding that the Union

wanted to bargain over the decision to lay off the New Business Advisors as opposed to the effects. (Tr. 721, 722, 769). Dickson testified that the Union never told her it wanted to bargain over the decision to lay off the New Business Advisors as opposed to the effects; and that she understood that the Company and Union were bargaining over the effects and not the decision (Tr. 818).

Not a single participant in the negotiation testified that he or she believed that there was decisional bargaining afoot. Gowdy the head of the Union and a bargaining participant, who attended the trial, did not testify. Nor did Harry Esquivel also a participant in the bargaining and an attendee at the trial testify. And Waltz, who testified and was the Union's note-taker at bargaining was not asked by the General Counsel whether there was a demand for decisional bargaining that went unrecorded. But since he consistently wrote his notes under the caption, "EFFECTS BARGAINING," that is probably not surprising. It is hardly likely that it was a coincidence that both parties labelled their notes effects bargaining.

Merely objecting to the proposed changes, as was done here, is insufficient to trigger an employer's bargaining obligation. In *Clarkwood Corp.*, 233 NLRB 1172 (1977), the Board held that "In the present proceeding, the Union, as noted supra, upon receiving notice of the contemplated changes, contacted Respondent and objected to the changes, but the record shows that the Union never did request Respondent to negotiate about its decision to make the changes, though they had not yet been implemented…Such lack of diligence by a union amounts to a waiver of its right to bargain. *Id*. at 1173. In *American Buslines, Inc.*, 164 NLRB 1055 (1967), the Board ruled that a union which receives timely notice of a change in conditions of employment must take advantage of that notice if it is to preserve its bargaining rights and not be content in merely protesting an employer's contemplated action. *Id*. at 1056.[10]

[10] Similarly, any notion that the Company was under a duty to postpone the implementation of the layoffs because the Union was unable to meet or had not yet presented a proposal within the implementation time period provided by the

In short, it is hard to understand why the General Counsel alleges that the NBAs were laid off "without affording the [Union] an opportunity to bargain [and] without bargaining to a good faith impasse."[11] Nonetheless, the Company will also argue that there would have been no obligation to bargain even had the Union asked, and address a couple of collateral issues.

B. The Company Did Not Have A Decisional Bargaining Obligation.

Even had the Union requested decisional bargaining, the Company would have had no obligation to bargain over that decision. Under the prior CBA, the Company had the right to lay off employees when there was a surplus. (Jt. 1, pg. 57., Article 31.4.) Layoff was by seniority within job category. (*Id.*, Article 31.4.3) And the Company had exercised those rights with the Union while negotiating only over effects (Tr. 734-735). When the Company implemented Article 30 of the LBFO, there were changes in the procedural rules, but the right to layoff surplus employees by seniority continued. (Jt. 2, pg. 45-46, Article 30.2).

There are no facts in the record that suggest that the Company changed the status quo. The Company laid off the NBAs in accordance with its status quo rights going back at least to 2014. Therefore, under *E.I DuPont De Nemours and Company,* 368 NLRB No. 48 (2019), the Company would have had no obligation to bargain had the Union actually requested bargaining. *See also Oberthur Techs. of Am. Corp.*, 368 NLRB No. 5 fn. 4 (2019) (employer did not make a change requiring pre-discharge notice to the Union when it applied unchanged disciplinary standards in discharging the four employees); *see also Mike-Sells Potato Chip Co.*, 368 NLRB No. 145 (2019) (employer not required to bargain over decision to sell sales routes to independent distributers as

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Company fails as a matter of law. In *Mcgraw-Hill Broad Co., Inc.,* 355 NLRB 1283, the Board held "Here, the Respondent's January 9 layoff notice issued 3 weeks in advance of the implementation date. In the circumstances, this was an adequate period for the parties to negotiate over the layoff decision." *Id.* at 1284; *see also Bell Atlantic Corp.,* 336 NLRB 1076, 1088 (2010) (holding that a 2 week implementation time period as provided by the employer was sufficient); *see also Mid-South Hospita*l, 221 NLRB 670, 673, 675 (1975).

[11] It is difficult to address the "impasse" allegation. The Union neither requested bargaining nor made any proposals.

such was consistent with established past practice); *see also EIS Brake Parts*, 331 NLRB 1466, 1467-68 (2000) (employer lawfully "continued the status quo" when combining jobs during the hiatus period as the expired contract "spelled out the procedure to be followed in establishing a new or combined job" and the employer "adhered to those procedures").

C. Even If The Union Had Asked To Bargain, And Even If The Company Had an Obligation To Bargain With The Union, The Company Satisfied The Obligation.

Here Respondent addresses a largely theoretical construct. Had the Union claimed a right to bargain over the Company's layoffs of the NBAs, the Company would have considered whether that right existed and responded accordingly. Since no such right was claimed, and no proposals about the decision to lay off were made, the Company is left to reimagine what occurred in the context of such a claim.

Assume the facts would be as they are. The parties had bargained to impasse over the LBFO, and the Company had implemented the provisions of Article 30, the apparently appropriate provision the LBFO.[12] The parties met pursuant to the thirty day period set out for consideration of the layoff. Devoting that period of time to consideration of a layoff is appropriate under black letter Board law. *See Mcgraw-Hill Broad Co., Inc.*, 355 NLRB at 1283 (2010) (three weeks is sufficient); *see also Bell Atlantic Corp.*, 336 NLRB at 1088 (2010) (two weeks is sufficient). In this context, the General Counsel's allegation that the Company failed to meet or to bargain to impasse is hard to fathom. Particularly given that the Company was implementing a structure which indisputably had been bargained to impasse, and which essentially codified Board law as to a reasonable time for bargaining, the allegation as framed in the Complaint must fail.

[12] *See* discussion, infra re Article 41.

Moreover, the Union already had, or was provided, any information necessary to formulate decisional proposals. *See* pages 32 - 50, infra. The Union was well aware of the challenges facing the Company in providing enough revenue to the existing Business Advisors and was well aware of the Company's concerns regarding the viability of former DSE group. The parties had a year earlier bargained over the future of these employees and concluded that unless circumstances changed, they were in jeopardy. And the Union knew matters had only gotten worse.

In short, the Union was on notice, the parties met for the implemented period of time before layoff, the Union was informed of the facts leading to the layoffs, and the Company responded to any proposals the Union made -- which were none. Even hypothetically there was no violation.

1. The Article 41 issue.

Guthrie's question whether this was a force adjustment under Article 30, or a channel elimination under Article 41, has false premises, and no relevance to the Complaint as drafted by the General Counsel. Nonetheless, as requested by the Judge, Respondent addresses the issue.

Before addressing what might be understood to be the issue, a few points seem worth making. First, nothing about Board law suggests that when addressing an employer's behavior under a lawfully implemented proposal, Talmudic scrutiny to the possible multiple interpretations and hidden meanings is appropriate. To the contrary the decades long question is whether the employer's actions are "reasonably comprehended" by its implemented proposal. *See Taft Broadcasting Co.*, 163 NLRB 475 (1967), *enfd. sub nom. Television Artists AFTRA* v. N*LRB*, 395 F.2d 622 (D.C. Cir. 1968). Thus a conclusion that there is an alternative interpretation of a party's implemented proposal would not support a claimed 8(a)(5) violation. Here, the Company suggests that conducting a force adjustment in accordance with the "force adjustment" provision in the LBFO must pass muster under the reasonably comprehended standard.

Second, the Company did not eliminate any NBA "channel." Regardless of the perceived difference between "channels" and "job title," New Business Advisors are in the final agreement (current CBA) dated days after their last meeting about the layoffs. (Tr. 791, Jt. 3). Included is a detailed compensation plan for New Business Advisors negotiated by the parties after the layoff. (Tr. 791-792). The Union never said in this context that the "channel" had been eliminated. No doubt there were no NBAs as of October 21, but equally no doubt, had the Company decided to employ New Business Advisors in the future, their terms and conditions of employment will have been determined after the layoffs. (Tr. 784). In short, if an NBA was hired tomorrow, the CBA would apply. (Tr. 792).

To the extent that Respondent understands Guthrie's (who is not the General Counsel) position, it is that the layoff of all NBAs eliminated a "channel," and those accounts could only be reassigned within the channel from which they were being reassigned, therefore the Company could not reassign the NBAs' accounts, therefore the Company was obliged to bargain with the Union over the reassignment of the accounts, and therefore, the Company could not lay off the NBAs pending completion of that bargaining. Moreover this, sort of, explains the Union's repeated requests for information concerning the reassignment of accounts.[13]

Assuming that the Company has it right, Guthrie's understanding is wrong in several respects. First, the New Business Advisor role is a job title, not a channel. Although in their common parlance, the parties use the term interchangeably at times. The controlling document is, as Guthrie maintained the implemented SP/MAG (Tr. 56), which contains the definition of "channel." (Jt. 4, pgs. 122 and 125). While telephone NBAs are in a separate channel, there is no indication that premise NBAs are. Nothing suggests that they are not part of the regular Business

[13] Despite the Judge making the decision not to admit Respondent Exhibit 19 for lack of foundation, Respondent Exhibit 19 clearly shows that the NBAs simply did not have many accounts to reassign.

Advisor channel. Second, Guthrie's assumption that the SP/MAG demands reassignment within a channel ignores what the SP/MAG says, which is that the rules it contains are "guidelines" and cannot anticipate every situation. (Jt. 4, pgs. 6-7). This was an unusual circumstance, and the Company's response exhibited exactly the flexibility for which the SP/MAG provides.

Third, lurking somewhere in Guthrie's position is that the Company was required to negotiate account assignments. This is wrong. The Company constantly reassigns accounts. (Tr. 770, 928 929, 930, 949). This is a classic example of the dynamic status quo, and had been proceeding without objection by the Union for the year preceding the layoffs. Finally even if NBA was a "channel," which it is not, even were it eliminated, which it was not, and even if the SP/MAG forbade the reassignment of accounts to anybody who was not an NBA, which it does not, then there would be an inconsistency between the Company's right to lay off within a job title and its obligation to reassign accounts only within a channel. One section would have to yield, and the fact that the Company would have the account reassignment rules provision yield to the specific layoff article is "reasonably comprehended" by its proposal.

In short, even accepting what the Company believes are multiple distortions of fact and the controlling documents, Guthrie's theory is guff.

II. The Respondent's Responses To the Requests For Information.

The Union's view of requests for information belongs in the Phoenix Suns Arena, not at the bargaining table. It plays to draw a foul, not to obtain information necessary for collective bargaining or grievance processing. The Company recognizes that the standard for relevance is a generous "discovery standard," perhaps related to a time before the Supreme Court narrowed the standard in response to discovery abuse. *See* Fed. R. Civ. P. 26, advisory committee notes, 2015. Nonetheless, there are no Federal Rules of Civil Procedure applicable here. Rather the overarching Congressional standard remains "good faith" bargaining. *See NLRB v. Truitt Mfg. Co.*, 351 U.S.

149, 153-54 (1956) (while the Board's precedent provides a framework, "the inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met."); *see also Lakeland Bus Lines,* Inc., 355 NLRB 322, 324 (2001); *see also KLB Industries, Inc.*, 357 NLRB 127, 133 (2011). And when information requests are employed to defeat, not to advance that goal, it necessary to blow the whistle on the real offender. *See Chicago Tribune Co.*, 304 NLRB 259, 260 (1991) ("[T]he Board stated long ago that "a union's refusal to bargain in good faith may remove the possibility of negotiation and thus preclude existence of a situation in which the employer's own good faith can be tested. If it cannot be tested, its absence can hardly be found."); *see also Ingredion, Inc.*, Case Nos. 18-CA-160654 and 18-CA-170682, 2016 NLRB Lexis 633, *120 (2016) ("[T]he Board has long held that a union's refusal to bargain in good faith may remove the possibility of negotiation and thus preclude a finding of bad faith on behalf of the employer."); *see also August A. Busch Co*., 334 NLRB No. 137 (2001); *see also Whitesell Corp.*, 357 NLRB 1119, 1117 (2001) ("In evaluating the sufficiency of a respondent's bargaining efforts, the Board has also considered whether the other party's bad-faith bargaining has created a situation in which the respondent's good faith could not be tested and, therefore, could not be found lacking.").

A. The Union's Requests Must Be Seen In Context.

There is little doubt that the Union and the Company have scrapped over RFIs. The Company observes that it has no such scraps with the other unions with which it does business. (Tr. 805). That observation is hardly dispositive here, but it might provide a starting point for a perspective on the issue.

In response to that history of difficulty, the Company, in July of 2019, proposed to the Union that the parties negotiate an agreement to provide order to their persistent difficulties on the issue. (Tr. 805, 806, Jt. 13). Dickson testified the reason for the proposal was that the Company

thought it made sense for the parties to come to an understanding regarding how to fairly and efficiently process requests for information from the Union. (Tr. 805). After receiving the Company's proposal, the Union proceeded from its first position, that it had no obligation to bargain over such matters because the Company had the non-negotiable obligation to pay the freight (Jt. 14), through a general observation that the Company's leadership should show greater deference to the Union's expertise in running the business (Jt. 15, pgs. 3-4), finally settling on an insistence that the Company come to San Francisco if it wanted to bargain over the issue (Tr. 445, 659), continuing its refusal to acknowledge modern methods of communication that many think facilitate bargaining.[14] It is difficult to square this with Guthrie's admission that he thought that the Company's proposal was a "positive step." (Tr. 525-526). As Dickson testified, at no point in time after the Union reviewed the Company's cost sharing proposal did the Union give the Company a counter proposal or offer to pay for the costs of gathering information. (Tr. 806). For his part, Guthrie, after multiple attempts to evade the question, finally agreed that there had been no such proposals. (Tr. 441). Waltz confirmed the same. (Tr. 659)

The significance of the Company's efforts to have the Union participate in the cost of compliance to the specific RFIs at issue here, is discussed below. For present purposes, Respondent notes the attitude. If the Union was really focused on receiving necessary data from a reluctant Company, then it should have embraced the offer to negotiate a grand bargain. To demand that the Company travel to San Francisco without even an assurance of a counter proposal, was to invite the Company to yet another expensive and pointless tongue lashing.

[14] The Union, as if to demonstrate its willingness to obstruct any possibility of agreement in any context, had refused to respond to the Company's LBFO because it had been emailed rather than passed across the table. (Tr. 813).

B. B. Some Indications Of Bad Faith In Making RFIS.

1. The timing of the requests.

A lot can be told about the good faith of information requests based on their timing. A union needing information to support bargaining, will consider what it needs to form proposals and seek the information as soon as possible. A union wanting to obstruct negotiations will wait until there is some risk that the bargaining process has been exhausted, producing either an agreement or impasse, and then interpose information requests and feign an inability to conclude the negotiations until the requests are satisfied.

Here, the Union was informed about the layoffs on August 21. It had made information requests only for Henshaw's script, and the form of the severance releases prior to the first meeting three weeks later. (Tr. 102, 725). The first certainly has nothing to do with formulating proposals about effects. The second was immediately satisfied, and although the Union critiqued the release (the same as used for the prior year's call center layoffs, modified to account for California law), it never made a counter proposal. (Tr. 361).

Over time, including after the NBAs had been laid off, the Union continued to come up with new requests for information, some perhaps not actually related to the layoffs - the September 11, October 3, October 17 and October 30, 2019 requests all fit this bill. All of these late requests could have been made in August, had the Union actually been engaged in the bargaining process, as opposed to engaging in obstructing it.

2. Never, ever be clear.

If requests are made with clarity, you might get what you asked for, as opposed to a dispute about what was requested. Whether or not Guthrie's inability to express himself clearly is totally feigned, it certainly is effective to cause disputes. This is evident from the record. Respondent urges the Judge to review Guthrie's misplaced and misguided understanding of channels as an

"ecosystem," that markets are "static," the difference between Article 30 and Article 41 of the LBFO, the difference between eliminating a job position versus eliminating a channel, the notion of an "audit trail[15]," and the SP/Mag - particularly how accounts are reassigned. (Tr. 68, 70, 100, 101, 134, 136, 137, 138, 151, 153, 328). Respondent also urges the Judge to evaluate Guthrie's purported rationale for substantiating the relevancy of information requests and how that rationale leaves more questions than answers. (Tr. 212-230, 240, 247). With a warped understanding of this employer's operations and key terms thereto, the Union's requests for information normally oscillated between irrelevant and the Company left guessing the actual meaning of the request.

3. Asking for information already in one's possession.

It is well settled that an employer does not have an obligation to provide a union with requested information if the union is already in possession of the information or has equal access to the information. *See New Associates*, 307 NLRB No. 174, *1134 (1992); *see also Columbia Memorial Hospital,* 362 NLRB No. 154, *49 (2015).

Having put an employer to the cost of producing information, a union, if it is acting in good faith, probably reads the material and does not ask for the same thing again. Respondent recognizes that a large union, with many representatives, might suffer from a lack of coordination. But this Union, which represents around one hundred employees, has four full time officers -- who average over $100,000 annually -- and which has a full time office manager, should be able to read and keep track of the data it receives.

4. Make so many requests that the employer will eventually tell you to buzz off.

Returning again to the federal court discovery analogy, a party that makes incessant demands, eventually has to face a federal judge on a motion for a protective order. A party

[15] Vitales testified that the audit trail vernacular stemmed from Pacific Bell and that the Company did not have the capacity to performs the type of audit trail requested by the Union on the Company's system. (Tr. 700).

demanding information in this labor management context faces no similar gate keeper. Each request requires the responder to either pull together the information or hope that it can convince an NLRB Regional Director or an Administrative Law Judge that the requester's behavior was so extreme as to defeat a Section 8(a)(5) allegation.

So ignore the significance of what the employer wants to do because there is no proportionality constraint. To the contrary, imposing a cost that outweighs the benefit sought by the employer from any change might discourage the employer's action. (R-4). Here the Union made request after request, sometimes over matters that all of the other unions took in stride without thinking the matter warranted bargaining or requests for information. (Tr. 805). Little wonder the Company's internal emails occasionally reflected irritation.

Any notion that this was an employer who ignored requests or tried to evade substantive dialogue with the Union over requests (or anything else) is belied by the record evidence. As demonstrated by Respondent Exhibit 6, in 2019 alone, Dickson and Guthrie exchanged over five-hundred emails resulting in close to two-thousands pages of documents. (R-6). A common theme is evident from these exchanges. The Company is responsive to Union inquires despite the sheer volume and the Union never seems to be satisfied by the Company's responses. As Vitales, the Company representative on the ground testified, he never observed that the Union actually used the proffered request information. (Tr. 712). Additionally, as Vitales and Dickson testified, it would appear the Union's modus operandi is to never make proposals. (Tr. 711, 722, 811, 812, 813). Little wonder the Union did not want to make even a modest proposal to absorb the cost of its demands. It might have asked only for the information it needed.

C. The RFIS In This Case.

1. What was truly relevant.

There were two kinds of questions that the Union could have asked dealing with the layoff. As to the effects bargaining, the bargaining in which both parties indicated that they were engaged, the Union sought and received information about severance pay, releases therefor, disability benefits, and allegedly unpaid expenses. The Company understood the relevance of these requests, and responded. The General Counsel does not allege to the contrary.

As to the decisional bargaining which the Union did not request, the Union made requests that seemed to sniff around the edges of this issue. For example it asked what the NBAs sales objectives[16] were and whether they had changed. (Tr. 288, 305). The Company promptly answered. More generally, to the extent that the Union asked about the NBAs' assignments, or claimed that the Company should have folded then into the regular premise group, the Union already had more documentation than was necessary to answer these questions.

When every market is thrown, that is every time a sales team starts a new campaign[17] in a new area, the Union is given a comprehensive report, the same received by the manager of the employees. (Tr. 894). As was testified to in detail, the reports contain the history of every assigned customer, the current revenue, the person to whom it is assigned, and whether and how much some responsibility for the account is assigned outside the bargaining unit, for example to one of the telephone call centers. (Tr. 698-699). The report tells how much revenue is assigned to each representative, and the total assigned revenue for the campaign. (Tr. 698-699). As Bickmire testified:

> "There's a -- there's a lot of information here. If I can -- if I can go from tab to tab, that would probably -- would be the best way to explain it" including but not limited

[16] This despite the fact that Guthrie admitted he was already in possession of the Company's objectives. (Tr. 305).
[17] A campaign is synonymous with a canvass. (Tr. 926).

> to roster of people who would be working on the campaign, the market they have been assigned, and all pertinent information related to the revenue of each account for the duration of the campaign." (Tr. 895-922, R-21, R-22).

While some revenue is reassigned during the campaign, that would not change the overall size of market, and the Company regularly answers relevant questions about reassignments, often working in conjunction with the Union. (Tr. 923).

Presumably, when in 2018 the Union studied the Company's ability to fold the then-DSEs into a regular premise representative role, and concluded that there was insufficient revenue to entertain that possibility, it was such market break reports upon which the Union relied. It had identical information in August of 2019 when the layoffs were announced. While Guthrie concedes that he could determine the size of the available markets from available data, there is no indication that he or any other Union representative sought to renew the prior year's inquiry. The Union well knew that the data demonstrated that there was insufficient revenue to support more regular premise representatives. The NBAs would likely still fail, and six more premise representatives would have diluted the already too small number of accounts by 10%. The Union cannot claim that any other data was necessary. A request for more data must be seen for what it was: an effort to impose cost and cause delay.

In any event, the obvious starting point to formulate its demands was with the NBAs. There were only six and there were four full-time officers. The Union had known the NBAs were in jeopardy for at least a year, and a responsible union would monitor their performance. And every NBA had complete access to the Company's data.[18] NBAs have access to every shred of their

[18] The Judge suggested that it is not a response to an RFI charge for an employer to say that the employees already have the material. The point here is that it goes to the good faith of the request for the Union to assign the Company homework that the Union has access to and should have already assimilated.

sales assignments, activities and sales through the duration of the market. (Tr. 926). They also had full access to the Sales Force program which records their activities. (R. 7, R.8).

Remarkably, while Guthrie admitted to speaking with the New Business Advisors regarding some issues, he never discussed their market assignments with them. (Tr. 392). While demanding information from the Company, it seems that neither Guthrie nor the other officers discussed with the NBAs whether there was any possibility of a future with the Company. This reflects either irresponsibility or a certainty of the answer.

The Union also had current information about what revenue had been assigned to sales personnel outside the bargaining unit. In July of 2019, the Union received detailed data accumulated by agreement with Region 20. The information, if it had been reviewed by the Union, would have revealed whether the Company was siphoning off revenue that could be performed by the bargaining unit. Either the Union studied the data and concluded that revenue handled elsewhere was properly performed elsewhere, or did not bother to read the materials.

Given the Union's access to all the market data, and the NBAs themselves, the Union's September 11, 2019 request was not made in good faith. It made requests related to the "work locations" of the six New Business Advisors, but had been in possession of that information dating back to the summer of 2018 when the Union received biographical data for all employees as part of negotiations for a successor collective bargaining agreement. (Tr. 380-382). At no point in time did Guthrie tell Vitales that he could not locate his six members who paid him dues and were the subject of scrutiny by both parties a year earlier. (Tr. 723).

The point was so obvious that Vitales took the inquiry to be what the specific assigned "work location" was for application of Article 30, to which he responded "the work location was pretty irrelevant since we were getting rid of all the new business advisors in the entire bargained-

for folks. And we both knew -- the company and the Union knew were the locations were for these employees." (Tr. 723).

The Union's request for market assignments was pure harassment. As highlighted above, not only do NBAs receive their market assignments prior to the start of the market, but the Union is provided with that information as well. (Tr. 698, 892-893). The Union's observation that sometimes accounts move between employees is irrelevant. As it relates to the layoffs, it is the size of the market which would inform the possibility for useful employment of the NBAs in a new role.

2. The request regarding Pantoja's assignment.

On July 24, 2019, Waltz sent Mai Frances Nguyen an information request, disregarding Dickson's insistence that all information requests be made to either to Janie Robinson or Dickson. (Tr. 819, 820, Jt. 21). Waltz requested "which market was Mr. Pantoja hired for and which bag (Catellon or Ramos) is he being assigned." (Tr. 572, Jt. 18,). On July 25, one day later, Dickson responded to Waltz's request (Jt. 20) and stated "Your request for information was referred to me in keeping with my request of the Union. You may not be aware, but the Company has made a request to the Union to submit all Request for Information (RFIs) to me and Janice Robinson. We want to make sure that we respond to the Union's request for information as efficiently as possible." (*Id.*). Dickson then told Waltz "in response to your request, Mr. Pantoja filled a vacancy that was approved to be staffed in the San Francisco market area. Mr. Pantoja is not a new hire." (*Id.*).

Dickson testified "For Mr. Pantoja, the -- I don't remember the exact question. But it was as if he were a new hire into a regular business advisor position. And he wasn't a new hire. He was -- he filled a vacancy. There was a requisition and he filled a vacancy in the San Francisco market area." (Tr. 820). With regard to what market Mr. Pantoja had, Dickson testified "Well, I had

already said in the San Francisco area. San Francisco market." (Tr. 820). Importantly, Dickson testified that the Company never received a follow-up question regarding Mr. Pantoja. (Tr. 820). At that point Waltz had been reminded that all requests should go to Dickson and he had received an answer to his question.

What followed should no longer surprise. Waltz admitted that Pantoja was assigned to the San Francisco market. (Tr. 643), but testified that Dickson's response was a "general answer" and that "it didn't speak to what market he was assigned." (Tr. 642). Allowing that Waltz's question, and not Dickson's answer, might have been too general for his needs, one might have expected that Waltz would follow up with Dickson, clarifying his question. He did not.

Waltz never followed up with Dickson, and in any event the Union never grieved anything to do with Pantoja's assignment, which apparently irked other employees. (Tr. 643, 656). Nonetheless the Union claimed that the Company violated the Act. [19]

3. The twin accounts requests.

In the face of the indisputable principle that a party cannot produce what it does not have, the General Counsel faults the Company's handling of the "twin accounts" RFIs. The Company was merging its Dex and its YP systems. Among the issues were customers which had been served by both companies. The Company understandably did not want to compete with itself, and started to analyze the accounts and set out to make determination as to which of the two salespersons serving the customer would be the sole representative.[20]

[19] The reality is that the markets Luis Pantoja and Marlon McConner were assigned was not relevant to formulating a proposal regarding the force adjustment. Pantoja and McConner may have been managers at YP but both had been hired to work in the unit before Dex acquired YP on June 30, 2017. McConner has been employed as a Business Advisor since January 20, 2019, while Pantoja was employed in the unit as a New Business Advisor until becoming a Business Advisor-Premise on July 21, 2019. Pantoja filled an open position. The New Business Advisors being transitioned to the Business Advisor position would have diluted the business handled by the existing representatives.

[20] As testified in detail at hearing, the implemented SP/MAG provides rules for such situations. (Tr. 726, 810, 930, 951).

Despite the Company asking the Union to await the results of its analysis, the Union grieved the issue demanding to know which accounts had been assigned. (Jt. 8, 9, 10, 11). In July 2019, when the grievances were filed, the Company told the Union that "it would be mid-to-late September before unification is completed." (Jt. 45). The Company explained that the unification process was ongoing and promised that the requested information would be reviewed with the Union "before any final decisions" were made (Jt. 8, 9, 10, 11).[21]

True to its word, the Company discussed the requested information with the Union when the parties met to discuss the grievances on October 16, 2019. (Jt. 74, 75). After that meeting, on October 30, 2019, the Company emailed the list of twin accounts to the Union and explained that the twin accounts that were assigned to unit employees remained "assigned to those same reps." Indeed, the Company provided "attached is the unification file of accounts that were in the 2 situations we discussed with the union in the hearing of Grievances N-0007-19 and N-0009-19. (Jt. 90, 90-a). As Bickmire made clear, once the Company finished the unification/twin account process internally, they provided the information to the Union. (Tr. 942).[22] About 90% of the twin accounts were assigned to the Northern California bargaining unit. While the Union, as the Judge observed, might have preferred a clean sweep (Tr. 946), the bargaining unit ended the process with more revenue than it started.

There was no unlawful delay in the production of the information. The Company, as required, made "a reasonable good-faith effort to respond to the request as promptly as circumstances allow." *See The Good Life Beverage Company,* 312 NLRB 1060, 1062 n.9 (1993).

[21] In the interim the disputed accounts were assigned to a "manager's line, while each salesperson continued to get credit for the sales he or she made. Inexplicably, but true to form, the Union then demanded to know all accounts assigned to any manager's line. The Company assumes that this request was washed out by the events of October.
[22] Bickmire testified that it was fair to conclude that much more revenue was going into Northern California, then was going out of Northern California. (Tr. 945). In this regard, Guthrie admitted that it is good that revenue stayed with the Union as a result of unification (Tr. 479).

An employer "cannot be expected to provide information it does not have." *See Day Auto. Group,* 348 NLRB 1257, 1263 (2006); *see also Whitesell Corp.*, 352 NLRB 1196, 1197 (2008) .

There can be no violation where, as here, the union requests information before that information exists and the employer provides the information when the information does exist. While the Company acknowledges that the parties discussed the information as far back as July, the reality is that once the information became available, the Company delivered the Union with the same. There was nothing unlawful about that response because an employer "cannot be expected to provide information it does not have." *See Day Auto. Group,* 348 NLRB at 1263 (2006).

But of course there remained a foul to be drawn. The Union received detailed information on every twin account, its address, and the representatives who were in competition. (Jt. 90, 90-a) But the Union wanted the names of the customers. (Tr. 240). The Company was reluctant to provide a portable list of its customers and asked whether the Union would sign a non-disclosure agreement. (Tr. 948). The Union refused, alleging that the Company had confidential information in the past. (Tr. 948, Jt. 75). The Union did not propose an alternative to the non-disclosure agreement, it simply refused to execute the non-disclosure agreement despite previously doing so in the past with regard to other information requests. (Tr. 495).

Guthrie did not seriously challenge that the information it sought was confidential. *See Medstar Washington Hospital Center*, 360 NLRB 846, 846, fn. 1 and 4 (2014); *see also NLRB v. Detroit Edison*, 440 U.S. 301 (1979). As he admitted, customer names would certainly be something the Company's competitors would be interested in. (Tr. 492).

The Company did not refuse the data, it simply asked the Union to commit to not revealing the data. Even when a confidentiality claim is established, an employer must offer to accommodate

both its concern and its bargaining obligation, "as is often done by making an offer to release the information conditionally or by placing restrictions." See *U.S. Testing Co. v. NLRB*, 160 F.3d 14, 21, 333 (D.C. Cir. 1998). The Union never offered to sign an NDA or to explain why it would not. The Union suggested that it had not always been required to sign one in the past, but never explained why signing such an agreement was a burden or how it might compromise its use of the data. See *American Cyanamid*, 129 NLRB at 684 (no violation where employer raised confidentiality concerns and union's "adamant insistence . . . on its right to have the Respondent's records in the terms set forth in its demand precluded, in effect, a test of the Respondent's willingness to give the Union access to the [presumptively relevant] wage information involved on mutually satisfactory terms"). *See also Good Life Beverage Co.*, 312 NLRB 1060, 1062 (1993); *see also Century Air Freight*, 284 NLRB 730, 734-735 (1987).

The General Counsel's position on this remains unclear. There really cannot be any question that customer lists are proprietary. *See LA Specialty Produce Company*, Case No. 32-CA-207919, 2019 NLRB Lexis 554 (2019). And while the Union's self-description of its own reliability may or may not be true, these parties have had rough times, and there is just no cost to the Union in signing a non-disclosure agreement.

So the bottom line on the twin accounts is that despite the Union's premature complaints, it received the information it requested as soon as it existed. Despite the good news it received, it demanded information about the bits that went to others. And the Company was willing to give it even confidential lists of customers if the Union only promised to not share it with others. The Company does not understand what it did wrong.[23]

[23] "House accounts" were only a holding line until the assignments were determined.

But the episode does prove something. The Union seems singularly uninterested in the basis for the obligation to provide information: good faith. It was oblivious to representations that the thing it was grieving had not occurred yet, and it would be provided the results as soon as there were any. Once provided the results, instead of appreciating the needed influx of revenue to its members, it picked a fight over one piece of data. Instead of providing written assurance to the Company that it would safeguard the data, it refused and filed a charge. The General Counsel should not have blown his whistle.

4. The market assignment request.

On October 17, 2019 Waltz sent Vitales, Bickmire and Dickson an email entitled "Market Assignment RFI" and proceeded to make a voluminous information request. (Jt. 86). If the requests actually related to the layoffs it would be a cardinal violation of Section 8(b)(3). The layoff was announced on August 21; the layoff was effected September 20; this request was made yet another month later. The Company will assume that this request was not related to the layoff, but to some more general, perceived need for data. The next day Dickson responded:

> "We have made a request for the Union to pay for its voluminous information requests. To date, we have not had any meaningful response. We await the Union's counter proposal on cost-sharing. (*Id.*).

On October 22 Waltz responded in part:

> "[the] Business Manager sent you a meaningful response to your proposal for RFI Cost sharing on July 2019… If you would like to meet and confer with the Union at a reasonable place and time, our bargaining committee is available. The Business Manager requests that if you would like to meet and confer over this specific information request that you contact Stefen to make bargaining arrangements. (*Id*).

Later that day, Dickson responded to Waltz in part:

> "You have made an extensive request, and we have asked the Union to participate in the cost of that request. We recognize the obligation to bargain over this matter, but we do not recognize an obligation to travel to California for that bargaining. You seem to have the proposal we gave the Union a while back--albeit not the

> complete exchange. Please forward me a counterproposal if you find our proposal unacceptable, and we can set up a time to discuss." (*Id).*

On October 23 Waltz responded to Dickson in part:

> "You have acknowledged that you understand the information request. We have accepted your offer to meet and confer at reasonable times and places to exchange proposals. You have refused to provide a date and time. No further notice will be given. The Union expects to receive all items we have requested without delay." (*Id*).

On October 24 Dickson responded to Waltz in part:

> "The Union has offered no counter proposal on cost-sharing but demands a face-to-face meeting on that subject. Please explain the perceived advantage of meeting in person and the perceived disadvantage of giving me a counter in advance. Your information request is greatly expanded from the request discussed in the beginning of the grievance meeting. Frankly, you should explain the relevancy of the entire list… We are not gathering data until we work out who pays." (*Id*).

On October 25 Waltz responded to Dickson in part:

> "You have not made any claim that our information request is irrelevant or overly burdensome… Your delay in providing the Union the information is an unfair labor practice." (*Id*).

Waltz's assertion that the Company had not said that the request was "overly burdensome" suggests editorial help from someone who had not read Dickson's emails. At the October 31 effects bargaining meeting, Vitales also informed the Union that the request was "voluminous" and that it would take "multiple departments" and "man hours" to put "together a report." (Jt. 92, pg. 1).

There can be no violation of the Act with respect to the October 17 requests because the Union refused to engage with the legitimate objections of the Company. In response to an objection and offer to cooperate, "the union may not ignore the employer's concerns or refuse to discuss a possible accommodation, even when the requested information is presumptively relevant." *See United Parcel Serv. of Am., Inc.*, 362 NLRB 160, 162 (2015). "If there are substantial costs involved in compiling the information . . . requested by the Union, the parties must bargain in good faith as to who shall bear such costs."' *See Safeway Stores, Inc.*, 252 NLRB 1323, 1324 (1980).

Thus, there was no violation where the employer raised a legitimate objection and the union responded with an "adamant insistence" on "records in the terms set forth in its demand," because that position "precluded, in effect, a test of the [employer's] willingness to give the union access to the [presumptively relevant] wage information involved on mutually satisfactory terms." *See Am. Cyanamid Co.*, 129 NLRB 683, 684 (1960). Similarly, the Board was "unwilling" to find a violation where an employer raised legitimate concerns and was "attempting" to reach a solution since "the union was responsible for obstructing such attempts." *See The Good Life Beverage Company*, 312 NLRB 1060, 1062 n.9 (1993).

Here, the record reflects that five days after receiving the Union's information request Dickson noted the extensiveness of the request. (Jt 86, pg. 3). In addition, the record reflects that seven days after receiving the Union's information request Dickson noted that the information request is "greatly expanded from the request discussed in the beginning of the grievance meeting" and that the Union should have to "explain the relevance of the entire list." (Jt. 86, pg. 2). On the later point, Waltz perplexingly responded that the Company did not claim the request was irrelevant and or burdensome irrespective - even though Dickson did. (Jt. 86, pg. 1). As Vitales testified, it would have taken "weeks" to compile the information requested by the Union (Tr. 739).

While the Board favors face to face meetings, *Success Village Apartments,* 347 NLRB 1065 (2006), the Union's insistence here is ridiculous. Not every request for bargaining requires airline and hotel reservations. As the Judge has seen, this Union's view of "bargaining" does not include counterproposals, but lengthy bursts of billingsgate. Dickson's request that she see a counterproposal before flying half way across the country to be abused was reasonable.

5. The quarterly relief request.

On April 11, 2019, Tracie Scarborough ("Scarborough"), Regional Operations Manager - California, sent an email to managers entitled "Quarterly Relief Timeframe." (Jt. 6). The email contained spreadsheets detailing quarterly relief. (*Id*). The email provided "Please share this with your team as you see fit. Quarterly relief is generally completed 3-4 weeks (3 weeks being the norm) after the quarter ends." (*Id*).

Quarterly relief is the process that the Company uses to deliver relief in terms of sales results to premise sales representatives who work reassigned accounts. (Tr. 949). Quarterly Relief was part the LBFO that was implemented. (Tr. 632). How quarterly relief gets calculated is contained in the SP/Mag. (Tr. 951). As Bickmire testified:

> "[G]enerally speaking, it's a process by where we try and set a floor so that an individual rep doesn't get overly harmed by working any reassigned accounts where they might take cancellations or decreases. And so we look at the -- the expectation in terms of what percent of the revenue they should renew. And that's set at the same as what we would expect them to renew for their regular accounts, their primary accounts. And if an individual after -- and we track this year to date at the end of every quarter. And if we find that a rep has experienced more loss or decrease, than what would've expected them to exper -- to lose, then we go through a process to take that dollar amount off of their results so that they -- they're back up to that floor." (Tr. 949).

Prior to the start of each quarter, managers are provided with a document that contains which of their premise sales representatives are receiving quarterly relief. (Tr. 951). This information is routinely shared with the Union upon request when it becomes available. (Tr. 951).

On April 12, 2019, Waltz emailed Scarborough and requested the Company "provide the Union with a list of accounts processed through Quarterly Relief in Northern California/Nevada by rep and account and dollar amount." (Jt. 19). This request was for information that did not exist. Had he read the controlling documents, it would have been clear to Waltz that relief is not

granted on and account by account basis. Rather it a safety net to protect against excess loss to representatives who suffer difficulty from reassigned accounts.

Nonetheless the Company spent time on Waltz's requests. In emails between Company representatives on April 12, 2019 Lori Prideaux Senior Manager, Sales Policy, said that "quarterly relief is provided to each BA typically 3-4 weeks after the quarter is over" and that "it's a onetime adjustment which reduces the BA's starting PI on their reassigned account bucket." (Jt. 7). She noted that her team was "currently finalizing the quarterly relief for No Cal" and that once that process is complete "and the amount of relief due to each BA, we typically share that info with the RVP/PSD in the region, and they sit down with each BA and share the details of the of the process and the accounts/products that were used to calculate the relief." (*Id*.).

Waltz did not follow up after July 2019 probably because he finally read the SP/MAG and understood that his request could not be satisfied, or because he learned that the quarterly relief for the first quarter of 2019 (the quarter the request was made for), was applied at the end of the first quarter and that it was "implemented." (Tr. 632, 633).Indeed, Waltz testified that bargaining unit members who were set to receive quarterly relief did in fact receive it and contacted Waltz to inform him of the same. (Tr. 633).

6. A summary of the RFIs.

From the perspective of the Company, the Union served a barrage of extensive and duplicative requests for information by design -- not to obtain information to use in the processes of collective bargaining required by the Act, but to manufacture charges, impose the burden and cost of voluminous requests and litigating charges, and thereby punish the Company for lawfully implementing changes after the parties reached impasse and for moving forward with planned layoffs.

CONCLUSION

For all the above reasons, the Complaint should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Arthur G. Telegen, Esq., certify that on this date I caused a copy of the foregoing Post-Hearing Brief to be served via E-mail and Electronic Filing through the Board's website upon:

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